

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)

Petition of SBC Communications Inc. For)
Forbearance from the Application of Title II)
Common Carrier Regulation to IP Platform)
Services)

WC Docket No. 04-29

OPPOSITION OF AT&T CORP.

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OPPOSITION OF AT&T CORP.

Pursuant to the Commission's *Public Notices*¹ in the above-captioned docket, AT&T Corp. ("AT&T") submits this Opposition to the petition for forbearance ("Petition") filed by SBC Communications Inc. ("SBC") for "IP Platform services."²

INTRODUCTION AND SUMMARY

The Petition should be denied. As an alternative to its parallel petition for a declaratory ruling³ (which AT&T also opposes in its comments filed today in WC Docket No. 04-36), SBC asks the Commission to "forbear" from applying *all* "Title II common carrier regulation to

¹ See Public Notice, WC Docket No. 04-29 (Feb. 12, 2004); Public Notice, WC Docket No. 04-29 (Mar. 30, 2004) (extending comment deadline).

² See *Petition of SBC Communications Inc. For Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29 (filed Feb. 5, 2004) ("Petition").

³ See *Petition of SBC Communications Inc. For a Declaratory Ruling Regarding IP Platform Services* (filed Feb. 5, 2004) ("*Petition For Declaratory Ruling*") (defining "IP platform services" to include networks relying on IP, the capabilities and functionalities of those networks, and services and applications utilizing those networks to facilitate communications).

IP platform services.”⁴ Specifically, SBC urges the Commission to “eliminate any doubt concerning the unregulated status of IP platform services by expressly forbearing from applying Title II regulation to these services to the extent that such regulation might otherwise be found to apply.”⁵ According to SBC, forbearance will “provide regulatory certainty,” but also “not prevent the Commission from fashioning under Title I whatever regulations it reasonably finds to be needed to achieve important public policy objectives such as universal service, public safety/E911, communications assistance for law enforcement, and disability access.”⁶

At the outset, it is important to understand the sweeping nature of SBC’s request, both with respect to the broad categories of services and facilities it covers, and the literally volumes of regulations and statutes that SBC asks the Commission to forbear from applying. Once the magnitude of SBC’s request is fully understood, it becomes readily apparent that SBC’s meager showing in its Petition does not remotely satisfy its burden of demonstrating that forbearance is appropriate with respect to *any* specific provision of Title II, much less *all* provisions of Title II. Indeed, SBC’s Petition falls so hopelessly short of satisfying the specific forbearance criteria that it can only be viewed as an attempt by SBC to rush the Commission to judgment on issues that it is considering in its IP-Enabled Services rulemaking proceeding.⁷ The Commission should not take the bait and instead should promptly and summarily deny the Petition.

The subject matter covered by SBC’s Petition is extremely broad. Significantly, SBC is not only asking for relief with respect to the “services” provided over IP networks, but also the

⁴ Petition at 1.

⁵ *Id.* at 2.

⁶ *Id.*

⁷ Notice of Proposed Rulemaking, *IP-Enabled Services*, WC Docket No. 04-36 (rel. March 10, 2004) (“*IP-Enabled Services NPRM*”).

underlying network facilities used to provide such services. In its *Petition for Declaratory Ruling*, SBC defines “IP platform services” as “(a) IP networks and their associated capabilities and functionalities (*i.e.*, an IP platform), and (b) IP services and applications provided over an IP platform that enable an end user to send or receive a communication in IP format.”⁸ As SBC acknowledges, “[t]his definition is expansive in that it encompasses the IP networks themselves and the uses to which these networks are put.”⁹ Moreover, with respect to the definition of “services” provided over IP networks, SBC broadly proposes that “[t]he touchstone for identifying IP platform services should be that the service reaches or leaves the end user in IP format.”¹⁰ Accordingly, the forbearance relief that SBC seeks would apply to an extremely broad – and ever-growing – category of facilities and services, including basic transmission services that have always been considered “telecommunications services” and the underlying facilities used to provide those services that have been subject to dominant carrier regulation.¹¹ Indeed, given that IP applications that provide “protocol processing” and “computing capabilities” are clearly “information services” that are not subject to Title II, SBC’s petition must primarily be considered a vehicle for obtaining deregulation of core telecommunications facilities and services.

⁸ *Petition for Declaratory Ruling* at 28.

⁹ *Id.* at 28-29; *see also id.* at 29 (SBC seeks “[a] ruling that encompasses not only IP-based services but also the IP-enabled networks over which they are provided”).

¹⁰ *Id.*; *see also id.* at 30 (“As long as the service provided affords the customer the ability to send and/or receive communications in IP, the service should be treated as an IP platform service”).

¹¹ *See id.* at 29 (“[T]he Internet’s future development is dependent on innovation at *both* the service and the facility levels. Therefore, the Commission must ensure that IP-based services as well as the IP-enabled facilities over which they are provided are allowed to evolve without regulatory restraint.”) (emphasis in original).

At the same time, SBC is asking the Commission to forbear from applying an entire regulatory framework: both the actual statutory provisions of Title II and the accompanying Commission regulations, which comprise several *volumes* of the Code of Federal Regulations. Significantly, Title II includes the very “heart” of the Communications Act, sections 201 through 203.¹² It also includes critical market-opening provisions of the 1996 Act, such as sections 251 and 271. SBC is asking the Commission to forbear from applying *each* and *every* provision in Title II and *each* and *every* Commission regulation to basic transmission services and facilities, without exception or limitation.

SBC’s burden in requesting such breathtaking relief is correspondingly high, and the Petition does not remotely satisfy that burden. Without even reaching the specific criteria for forbearance, SBC’s Petition suffers from numerous facial deficiencies, each of which independently precludes the Commission from granting it. Foremost, the Petition itself makes plain that the forbearance relief SBC requests is patently inappropriate because SBC concedes that if the Commission forbears from applying Title II regulations to the services at issue, it should reimpose many of the same or similar requirements under Title I. Under section 10 of the Communications Act, the Commission simply cannot deregulate now and ask questions later. Further, because the Commission has yet to identify the regulatory framework that will govern the various services at issue, it cannot conduct a meaningful analysis of the forbearance criteria based on specific market evidence. Indeed, SBC has not proffered any such evidence. And SBC’s across-the-board forbearance request is contrary to the express limits on the Commission’s forbearance authority contained in section 271(d)(4) and section 10(d) of the Act, which foreclose significant portions of the requested forbearance relief.

¹² See *MCI v. AT&T*, 512 U.S. 218, 229-30 (1994).

Even if SBC's Petition did not suffer from these facial flaws, SBC has not remotely met its burden of proving that its request satisfies the three fundamental prerequisites for forbearance. In particular, SBC has requested sweeping relief, yet made no serious attempt to make any of the showings necessary for an exercise of the Commission's forbearance authority, much less discuss or present evidence concerning the specific markets at issue. Indeed, SBC does not *discuss* even a single Title II regulation or law, much less *each* and *every* Title II regulation from which it seeks relief. Rather than focusing on individual regulations, SBC makes general arguments about the supposed evils of regulation and the benefits of competition. Section 10(a), however, does not permit the Commission to balance potential market power harms that would occur from deregulating a company such as SBC that controls essential access facilities against the potential benefit that such deregulation might increase investment incentives.

SBC's attempt to show that it faces meaningful competition under sections 10(a)(1) and (a)(2) is woefully inadequate. That is fatal to its attempt to eliminate regulation of network facilities and basic transmission services. For example, SBC seeks to avoid its section 251(c)(3) obligation to provide unbundled access to local networks that could be used to provide IP transport, but provides no evidence at all to show that customers who rely on those facilities can obtain them from a carrier other than SBC. Except for the most demand intensive customers, SBC does not face meaningful competition at the "facilities level" for IP telecommunications services with respect to last-mile transmission facilities. Moreover, even if SBC faces *some* competition for IP telecommunications services, it hardly follows that *all* applicable economic regulation, including sections 201 and 202, should be gutted. SBC's request is extraordinary because even in situations where the Commission has held that market competition generally could be relied on to produce cost-based and non-discriminatory rates, it has relied on the

continuing application of sections 201 and 202, as well as the Commission’s complaint process, as a backstop to remedy abuse of the regulatory relief granted.

SBC also cannot show that granting SBC’s Petition would be “consistent with the public interest” under section 10(a)(3). For example, the forbearance relief sought by SBC would give it and other incumbent local exchange carriers (“ILECs”) the unconditional right to discriminate against any content that they disfavor – such as the content of rival providers. SBC also fails to provide any justification for immediately eliminating altogether the application to IP-based telecommunications services of numerous Title II regulations that promote important public policy objectives, such as access to telecommunications services for the disabled, availability of E911 emergency services, and assistance to law enforcement even where those regulations (or similar regulations) are ultimately necessary to protect the public interest. In addition, SBC fails to provide any justification for eliminating application of the complaint process set forth in sections 207 and 208 of the Act to IP-based telecommunications services.

ARGUMENT

I. SBC’S FORBEARANCE PETITION IS PROCEDURALLY IMPROPER AND FACIALLY DEFICIENT.

The Commission need not examine any of the section 10(a) criteria for forbearance to reject SBC’s Petition. The Petition suffers from numerous threshold flaws – both procedural and substantive – that require the Commission to deny it on its face. Each of these flaws provides an independent basis to reject the Petition. Collectively, these overwhelming flaws confirm that the ill-conceived Petition is nothing more than an attempt to rush the Commission to judgment on issues that it is considering in its pending rulemaking proceeding.

A. SBC's Petition Is Premature Because The Commission Cannot Conduct A Meaningful Forbearance Analysis.

At the outset, SBC's Petition is fatally premature. Specifically, because the Commission has yet to identify the regulatory framework that will govern the various services at issue, it cannot conduct a meaningful analysis of the forbearance criteria. Under section 10(a) of the Communications Act,¹³ the proponent of forbearance must make three "conjunctive" showings, and the Commission must "deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied."¹⁴ First, the proponent of forbearance must show that enforcement of the specific regulations at issue to the specific services at issue "is not necessary to ensure that the charges . . . are just and reasonable and not unjustly or unreasonably discriminatory."¹⁵ Second, it must show that enforcement of those regulations "is not necessary for the protection of consumers."¹⁶ And, third, it must show that non-enforcement of those regulations "is consistent with the public interest"¹⁷ and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."¹⁸

Because these criteria focus on competition and consumer protection, both courts and the Commission have recognized that the Commission must examine detailed evidence concerning the markets for the specific services at issue. In particular, a request that seeks "the forbearance

¹³ 47 U.S.C. § 160(a).

¹⁴ *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

¹⁵ 47 U.S.C. § 160(a)(1).

¹⁶ *Id.* § 160(a)(2).

¹⁷ *Id.* § 160(a)(3).

¹⁸ *Id.* § 160(b).

of dominant carrier regulation under Section 10” demands “a painstaking analysis of market conditions” supported by empirical evidence.¹⁹ The Commission has recognized that it cannot simply “assume that, absent” the regulation at issue, “market conditions or any other factor will adequately ensure that charges . . . are just and reasonable and are not unjustly or unreasonably discriminatory.”²⁰

Thus, the section 10(a) analysis cannot be applied in the abstract, but instead must focus on the specific market conditions existing with respect to the particular regulations and services at issue. At this time, however, such an analysis is impossible – with respect to *any* of the section 10(a) criteria, much less *all* three of them. SBC’s broad Petition makes no attempt to identify with any specificity the services and facilities for which it seeks forbearance. Nor has SBC made an attempt to proffer the type of detailed market evidence that would be necessary to support the broad relief it is seeking. Thus, SBC’s Petition is wholly premature.²¹

B. SBC’s Petition Is Internally Inconsistent And Undermines Itself.

The Petition itself makes plain that the forbearance relief SBC requests is patently inappropriate. SBC concedes that if, as it requests, the Commission forbears from applying Title II regulations to the services at issue, it can – and indeed, should – reimpose many of the

¹⁹ *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp. v. FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001).

²⁰ Report and Order, Fifth Memorandum Opinion and Order, *1998 Biennial Regulatory Review – Review of ARMIS Reporting Requirements*, 14 FCC Rcd. 11443, ¶ 32 (1999).

²¹ In addition, SBC’s Petition does not comply with the Commission rule expressly providing that “[i]n order to be considered as a petition for forbearance subject to the one-year deadline set forth in 47 U.S.C. § 160(c),” the caption of the petition must identify the pleading “as a petition for forbearance *under 47 U.S.C. § 160(c)*.” 47 C.F.R. § 1.53 (emphasis added). SBC’s petition does not comply with this requirement because the caption does not identify the petition as filed “under 47 U.S.C. § 160(c).” As a result, SBC’s request “is deemed not to constitute a petition pursuant to 47 U.S.C. § 160(c), and is not subject to the deadline set forth therein.” *Id.* Thus, the
(continued . . .)

same requirements under Title I.²² Indeed, in the *Petition for Declaratory Ruling*, SBC urges the Commission to “use its Title I authority” to “conduct a rulemaking to consider whether any particular public policy mandates would be appropriate for IP platform services, including any that might be similar to those currently applied under Title II.”²³

SBC’s own arguments demonstrate that immediate forbearance from applying Title II regulations – which is what SBC seeks – cannot be appropriate. If re-regulation under Title I will be necessary to achieve important public policy objectives, then, by definition, immediate forbearance cannot be warranted. The Commission simply cannot conclude that non-enforcement of the Title II requirements satisfies the section 10(a) criteria if regulation under Title I is necessary to serve “public policy mandates.”²⁴ Moreover, to the extent that SBC is merely urging the Commission to re-enact significant portions of Title II regulation under its Title I authority contemporaneous with forbearance from Title II, that is a pointless exercise and a waste of the Commission’s resources.

(. . . continued)

one-year statutory deadline has not been triggered.

²² See, e.g., Petition at 2 (“Forbearance will not prevent the Commission from fashioning under Title I whatever regulations it reasonably finds to be needed to achieve important public policy objectives such as universal service, public safety/E911, communications assistance for law enforcement, and disability access”); *id.* at 11 (“to the extent the public interest requires the application of individual regulatory requirements to IP platform services to address public safety or other such concerns, the Commission has the authority to act under Title I and to tailor the requirements specifically to the context of IP platform services”); see also *Petition For Declaratory Ruling* at 3 (“[T]he Commission could craft and apply any necessary and appropriate regulatory requirements under Title I”).

²³ *Id.* at 42.

²⁴ *Id.*

The *Cable Modem Order* is not to the contrary.²⁵ As an initial matter, the Commission’s declaratory ruling in the *Cable Modem Order* – that cable modem service is “properly classified as an interstate information service,” not as a “cable service” or a “telecommunications service”²⁶ – cannot provide any support for SBC’s request because it was reversed on appeal. As SBC acknowledges, the Ninth Circuit reversed and vacated the *Cable Modem Order* and held that cable modem service includes both an information service component and a telecommunications service component that is subject to Title II regulation.²⁷

Further, even to the extent that the Ninth Circuit left the Commission’s “tentative decision” about forbearance intact,²⁸ that still does not save SBC’s Petition. In the *Cable Modem Order*, the Commission not only issued the declaratory ruling, but also initiated a rulemaking to “determine the scope of the Commission’s jurisdiction to regulate cable modem service” and sought comment on whether to “forbear from applying each provision of Title II or common carrier regulation,” “[t]o the extent that cable modem service may be subject to telecommunications service classification.”²⁹ The Commission “tentatively conclude[d] that such forbearance would be justified.”³⁰

²⁵ Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002) (“*Cable Modem Order*”), *rev’d on other grounds sub nom. Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003); *see* Petition at 3-4.

²⁶ *Cable Modem Order* ¶ 7.

²⁷ *Brand X*, 345 F.3d at 1132; *see* Petition at 3.

²⁸ Petition at 4.

²⁹ *Cable Modem Order* ¶¶ 7, 95.

³⁰ *Id.* ¶ 95.

The Commission's *tentative* conclusion with respect to forbearance – which the Ninth Circuit had no reason to address – does not compel the blanket forbearance SBC seeks here, for two independent reasons. *First*, the Commission's *tentative* conclusion in a Notice of Proposed Rulemaking is not binding on the Commission and has no precedential value. The Commission did not forbear from applying Title II in the *Cable Modem Order*, but instead merely sought comment on the issue. The Commission has expressly stated that when it seeks comment on a tentative conclusion in a notice of proposed rulemaking, this indicates that the Commission “recognized that it needed more information in order to make a fully informed decision, and not that the Commission had previously settled the issue.”³¹ As the Commission explained, a tentative conclusion is based on “limited information” and “does not preclude the Commission from altering its final position based on a more complete record.”³² Accordingly, the Commission's tentative conclusion with respect to forbearance in the *Cable Modem Order* is not Commission precedent that binds the Commission in this proceeding.

Second, even if the Commission's tentative forbearance conclusion were entitled to some weight in this proceeding, that tentative conclusion contemplated only very limited forbearance that could not support the broad relief SBC seeks here. Specifically, the Commission suggested that forbearance might be appropriate only with respect to a *single* service (cable modem Internet access services) that has never been regulated under Title II. It did not suggest that forbearance from Title II regulations might be appropriate with respect to any other service provided over cable facilities such as cable telephony, much less any other type of facilities. Nor did it suggest

³¹ Order on Reconsideration, *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd. 7609, ¶ 27 (2002).

³² *Id.*

that forbearance from core Title VI regulations that apply to cable facilities (the analog of the Title II provisions that apply to SBC's telecommunications facilities) might be appropriate. Accordingly, the Commission's tentative forbearance conclusion in the *Cable Modem Order* cannot support the blanket forbearance SBC seeks here for a broad variety of services and facilities.

C. The Commission Lacks Authority To Grant Significant Portions Of The Requested Forbearance.

SBC's across-the-board forbearance request ignores express limits on the Commission's forbearance authority. These limits foreclose significant portions of the requested forbearance relief.

1. Section 271(d)(4) Bars The Commission From Granting SBC's Forbearance Request With Respect To The Section 271 Competitive Checklist.

As noted above, SBC is seeking forbearance from *all* Title II regulation with respect to the "services" provided over IP networks and the underlying network facilities used to provide such services. Accordingly, the forbearance requested by SBC necessarily includes forbearance from enforcement of the section 271 competitive checklist. As a precondition to obtaining long distance authority, the section 271 competitive checklist requires that Bell Operating Companies ("BOCs") such as SBC provide unbundled access to specific facilities including loops, transport and switches.³³ Significantly, section 271 unbundling is required *without regard to whether the facility is part of an "IP platform" or not*. Thus, if the Commission were to grant SBC's Petition requesting forbearance with respect to *all* of Title II, it would forbear from applying the section 271 checklist to facilities that are part of an "IP platform."

³³ See 47 U.S.C. § 271(c)(2)(B)(iv), (v), and (vi).

Section 271(d)(4) expressly states, however, that “[t]he Commission *may not*, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).”³⁴ This specific statutory provision concerning the competitive checklist trumps the more general provisions of section 10 concerning the Commission’s forbearance authority.³⁵ Thus, notwithstanding its general authority to forbear from enforcing provisions of the Act, the Commission “may not” use forbearance to limit the terms of the competitive checklist, which is indisputably what SBC seeks in its Petition. By its plain terms, section 271(d)(4) ensures that, as long as a BOC offers (or intends to offer) in-region interLATA services, it must comply with an irreducible core of network access requirements, without limitation as to whether the facility is part of an “IP platform.”

SBC does not even mention section 271(d)(4) in its blanket Petition, and certainly makes no attempt to demonstrate that the relief it seeks is permissible under that statute. It is not. Section 271(d)(4) is an insurmountable barrier to SBC’s request as it applies to the section 271 competitive checklist.

2. Section 10(d) Prohibits The Commission From Forbearing From Any Requirement Of Sections 251(c) and 271 Before Those Sections Are “Fully Implemented.”

SBC’s Petition is also fatally premature in seeking forbearance with respect to the Title II requirements contained in sections 251(c) and 271. Section 10(d) places an explicit “[l]imitation” on the remainder of section 10, providing that the “Commission may not forbear from applying the requirements of section 251(c) or 271 . . . until it determines that those

³⁴ 47 U.S.C. § 271(d)(4) (emphasis added).

³⁵ See, e.g., *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524-26 (1989) (specific statutory provision trumps a more general one).

requirements have been fully implemented.”³⁶ The Commission considers section 10(d) as a “threshold matter” in forbearance proceedings, and a petitioner’s failure to satisfy its requirements mandates denial of the petition without consideration of its merits.³⁷

SBC does not even mention section 10(d) in its Petition, much less attempt to demonstrate that *all* – or even *any* – of the requirements of sections 251(c) and section 271 have been “fully implemented.” Nor could it. The objectives and purposes of the Act suggest that the requirements of section 251(c) and 271 will be “fully implemented” when, at a minimum, there is ubiquitous availability of cost-based wholesale alternatives to incumbent carriers’ bottleneck facilities, such that the incumbent carriers would no longer be deemed dominant in local services markets. The word “implement” means “to carry into effect, fulfill, accomplish” and to “give practical effect to.” And the word “fully” means “totally or completely.” Webster’s New World Dictionary. Sections 251(c) and 271 will be “fully implemented,” therefore, when a practical effect results: namely, when ubiquitous and durable local competition *actually exists* and the incumbents no longer control bottleneck facilities.³⁸ The requirements of sections 251(c) and 271 are not fully implemented, according to the plain meaning of those terms, where, as is the case today, local competition remains nascent.

SBC’s failure to address section 10(d) forecloses the forbearance relief it seeks from the requirements of sections 251(c) and 271. For example, section 251(c)(1) requires SBC “to

³⁶ 47 U.S.C. § 160(d).

³⁷ Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission’s Rules*, 18 FCC Rcd. 23525, ¶¶ 5, 9 (2003) (“*Verizon Forbearance Order*”).

³⁸ *Cf. Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 532, 538 (2002) (upholding Commission rules that interpret the “statutory dut[ies]” of section 251(c) to “reach the result the statute requires” and thereby “get[] a practical result”).

provide, for facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network." SBC would eliminate this interconnection obligation with respect to "IP platforms." Similarly, section 251(c)(4) requires SBC to offer for resale "*any* telecommunications service" that it provides, whether or not that service is an "IP platform service."³⁹ SBC would eliminate this resale requirement for telecommunications services that are "IP platform services."

SBC claims that the relief it seeks does not affect its section 251(c) unbundling obligations, but this claim cannot be reconciled with the "logic" of SBC's overbroad Petition.⁴⁰ Under SBC's definition of "IP platform service" – which includes *facilities* that are used to provide IP platform services – the local loop would be part of the "IP platform." Indeed, the local loop is the quintessential facility that allows a customer to "receive" IP data. Thus, if the Commission forbears from enforcing section 251(c) with respect to "IP platform services" – as SBC asks it to do – then the section 251(c) unbundling obligations would be eliminated for facilities, such as local loops, that competing carriers seek to lease to provide those services.

This is precisely the sort of regulatory forbearance that section 10(d) precludes the Commission from even considering until all of the market-opening requirements of sections 251(c) and 271 have been fully implemented. Because there is no sustainable construction of section 10(d) under which the "fully implemented" requirement could be found satisfied, the Commission has no authority to grant SBC's request that it forbear from applying the requirements of sections 251(c) and 271 to "IP platform services."

³⁹ 47 U.S.C. § 251(c)(4) (emphasis added).

⁴⁰ See Petition at 9 ("[T]o the extent the Commission retains unbundling obligations for xDSL-capable loops, as an example, that obligation would survive a determination that IP platform services offered over that loop are unregulated").

II. THE PETITION DOES NOT SATISFY ANY OF THE SECTION 10(a) FORBEARANCE CRITERIA.

Even if SBC's Petition did not suffer from numerous, fatal threshold flaws, SBC has not remotely met its burden of proving that its request satisfies the three fundamental prerequisites for forbearance: that the regulations at issue are unnecessary to protect competition, consumers and the public interest. Indeed, SBC makes only the barest attempt to meet its burden – a mere seven pages that do not even attempt to show that all three forbearance criteria are met for each and every Title II regulation that could apply to IP-based telecommunications services. Moreover, SBC's Petition does not contain *any* discussion or evidence concerning the specific markets at issue, wholly ignoring the fundamental requirement that the Commission can only grant forbearance based on “a painstaking analysis of market conditions” supported by empirical evidence.⁴¹ No such analysis is possible based on SBC's cursory Petition, and the Commission therefore should reject it on its face.

SBC utterly fails to meet its burden under section 10(a) because it does not *discuss* even a single Title II regulation or law, much less provide any analysis demonstrating that the three section 10(a) criteria for forbearance are satisfied with respect to that regulation or law. Because SBC fails to analyze even a single regulation, the Commission has no basis to forbear from applying *any* Title II regulation to the services at issue, much less *each and every* Title II regulation, as SBC requests. Indeed, the across-the-board forbearance relief that SBC requests would be unprecedented. The Commission has never granted forbearance relief without applying the forbearance criteria to individual regulations, much less granted wholesale forbearance relief with respect to an entire title of the Communications Act.

⁴¹ *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp. v. FCC*, 236 F.3d (continued . . .)

Rather than focusing on individual regulations and attempting to demonstrate that enforcement of particular regulations is no longer warranted, SBC instead makes general arguments about the evils of regulation and the benefits of competition, particularly as they impact investment incentives. In this vein, SBC argues that “[a]ny doubt about the appropriateness of forbearance in this context should be resolved by section 706 of the 1996 Act,” which directs the Commission to “promote broadband investment.”⁴² These arguments are misguided. All would agree that, other things being equal, economic regulation is not necessary in competitive markets. But section 10(a) does not permit the Commission to balance potential market power harms that would occur from deregulating a company such as SBC that controls essential access facilities against the potential benefit that such deregulation might increase investment incentives. Such balancing is foreclosed by section 10(a)’s plain language. As noted, section 10(a) requires three *conjunctive* showings. The first two showings – that enforcement of the regulation at issue is not necessary to ensure just and reasonable rates and conditions and that enforcement is not necessary to protect consumers – are absolute and do not permit balancing.⁴³ And while the third showing – that forbearance is consistent with the “public interest”⁴⁴ – may permit consideration of investment incentives, the Commission cannot grant forbearance unless *all three* showings are satisfied. Section 706 does not change the analysis. As SBC acknowledges, section 706 is not “an *independent* source of forbearance authority.”⁴⁵

(. . . continued)
729, 735-37 (D.C. Cir. 2001).

⁴² Petition at 11-12.

⁴³ 47 U.S.C. § 160(a)(1), (2).

⁴⁴ *Id.* § 160(a)(3).

⁴⁵ Petition at 11-12 (emphasis in original); see *Triennial Review Order*, 18 FCC Rcd. 16978, (continued . . .)

Thus, even if section 706 could be considered under the section 10(a)(3) public interest analysis, section 706 plainly does not authorize the Commission to rewrite section 10(a) to allow a trade-off of market power harms against investment incentives.

Turning to the three section 10(a) criteria, a few examples will demonstrate that SBC's attempt to make the required showing is woefully inadequate. For example, with respect to section 10(a)(1), SBC cavalierly asserts that "Title II regulation is not necessary to ensure that IP platform services will be offered in a just, reasonable, and nondiscriminatory manner," because the market "is already highly competitive" and "market forces" therefore will ensure that rates and provider practices are reasonable.⁴⁶ Similarly, with respect to section 10(a)(2), SBC asserts that "Title II regulation of IP platform services also is not necessary to protect consumers" because existing competition protects consumers.⁴⁷ SBC, however, offers no market evidence in support of these bare assertions. The lack of empirical support for SBC's claims is unsurprising because they are nothing more than wishful thinking with respect to basic transmission services provided by IP networks and with respect to competition at the facilities level. For example, among the statutory obligations that SBC seeks to avoid through its Petition is its section 251(c)(3) obligation to provide unbundled access to local networks that are used to provide IP services. SBC provides no evidence at all, however, to show that carriers and internet service providers ("ISPs") that currently rely on those facilities can obtain them from a carrier other than SBC. No such evidence exists because SBC is the monopoly provider of the last-mile

(... continued)

¶ 176 (2003) (section 706 grants the Commission no "independent" authority) (citing precedents).

⁴⁶ Petition at 11.

⁴⁷ *Id.* at 10.

facilities that other carriers and ISPs must obtain to provide their services. Accordingly, SBC has not even come close to demonstrating that it faces meaningful competition at the “facilities level” for IP telecommunications services.

Moreover, even if SBC faces *some* competition for IP telecommunications services, it hardly follows that *all* applicable rate regulation should be gutted. SBC is asking the Commission to forbear from applying *all* Title II regulations, including sections 201 and 202, which are the core provisions requiring SBC to provide service at rates that are just and reasonable and on terms that are nondiscriminatory.⁴⁸ This is an extraordinary request because even in situations where the Commission has held that market competition generally could be relied on to produce cost-based and non-discriminatory rates, it has relied on the continuing application of sections 201 and 202, as well as the Commission’s complaint process, as a backstop to remedy abuse of the regulatory relief granted.⁴⁹ Here, in contrast, SBC is asking the Commission to find that sections 201 and 202 – which require SBC to provide service at just and

⁴⁸ See 47 U.S.C. § 201(b) (“All charges, practices, classifications, and regulations for and in connection with such communication service [interstate or foreign communication by wire or radio], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful”); *id.* § 202(a) (“It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . .”).

⁴⁹ See, e.g., Order, *Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, 11 FCC Rcd. 3271, ¶ 13 (1995) (granting AT&T’s motion to be reclassified as a non-dominant carrier with respect to the interstate interexchange market because it lacks market power, but noting that “AT&T will still be subject to regulation under Title II,” including sections 201 and 202, and the Commission’s complaint process set forth in sections 206-209); *id.* ¶ 130 (“The status of AT&T as either a dominant or non-dominant carrier, therefore, does not alter its obligation to comply with” sections 201 and 202); Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd. 14221, ¶¶ 41, 65, 83, 127, 129, 131 (1999) (granting pricing flexibility to LECs subject to price caps for their interstate access charges, but noting the availability of section 208 complaints to raise claims under sections 201 and 202).

reasonable rates – are *not* necessary to ensure that SBC’s rates are just and reasonable as required by section 10(a)(1). Such a finding would be contrary to the Commission’s prior reliance on sections 201 and 202 to discipline carriers, even in competitive markets.

The relief sought by SBC also would raise troubling issues, any one of which precludes a finding by the Commission that granting SBC’s Petition would be “consistent with the public interest” under section 10(a)(3). The forbearance relief sought by SBC would give it and other ILECs the unconditional right to discriminate against any content that they disfavor – such as the content of rival providers. SBC (and other ILECs and cable companies) could, for example, discriminate against rival providers of voice over internet protocol (“VoIP”). Many VoIP providers do not have their own access facilities and must rely on their end-user customers to purchase their own access. Such discrimination therefore would stifle emerging VoIP competition as VoIP providers would have no ability to provide their services to end-users.

SBC also seeks to eliminate the application to IP-based telecommunications services of numerous Title II regulations that are not designed to prevent the exercise of market power, but instead to promote public policy objectives. For example, sections 255 and 251(a)(2) of the Act impose requirements that enable persons with disabilities to have access to the telecommunications network.⁵⁰ In addition, Commission regulations ensure the availability of 911 and E911 services to promote public safety.⁵¹ Other regulations ensure that law enforcement

⁵⁰ Section 255 requires manufacturers of telecommunications equipment to ensure that such equipment is accessible to individuals with disabilities, if readily achievable, and requires providers of telecommunications services to ensure that their services are accessible to individuals with disabilities, if readily achievable. *See* 47 U.S.C. § 255. Section 251(a)(2) prohibits telecommunications carriers from installing network features, functions, or capabilities that do not comply with the standards set forth in section 255. *See* 47 U.S.C. § 251(a)(2).

⁵¹ *See* 47 C.F.R. § 20.18 (requiring covered carriers to provide either basic or enhanced 911 services).

officials can intercept communications when necessary for law enforcement purposes.⁵² SBC offers no justification for eliminating these requirements. Indeed, SBC concedes that these public policy objectives are “important”⁵³ and cannot go unaddressed. As noted, SBC believes that the Commission likely would have to re-enact these regulations (or similar regulations) under Title I.⁵⁴ This concession demonstrates that immediate forbearance prior to the promulgation of cognate regulations under Title I cannot be “consistent with the public interest” as required by section 10(a)(3).

Finally, SBC’s blanket forbearance request encompasses sections 207 and 208 of the Act, which, respectively, permit persons injured by common carriers such as SBC to seek damages via complaints to the Commission or in federal district court, and to file complaints to the Commission requesting investigations.⁵⁵ Elimination of these important enforcement tools with respect to IP platform services would prevent complaints against ILECs for unreasonable and unlawful practices in connection with the provision of such services. This would leave the Commission without an important means of enforcing federal requirements, and leave competitors without an often-used remedial mechanism. Again, SBC has offered no justification for eliminating these important provisions.

⁵² See 47 U.S.C. § 1000 *et seq.*

⁵³ Petition at 2.

⁵⁴ See Petition at 2, 11; *Petition for Declaratory Ruling* at 3, 42.

⁵⁵ 47 U.S.C. §§ 207, 208.

CONCLUSION

For the foregoing reasons, the Commission should deny SBC's Petition.

Respectfully submitted,

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May 28, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May, 2004, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: May 28, 2004
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⁵⁶ Filed electronically via ECFS